No. 177.

Brief of Thomas & Duvall for D. C.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1897.

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HOSMER B. PARSONS, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA ET AL.

Error to the Court of Appeals of the District of Columbia.

SIDNEY T. THOMAS,
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Attorneys for the District of Columbia,
Defendant in Error.

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BRIEF FOR THE DISTRICT OF COLUMBIA.

This was a proceeding in *certiorari* to quash the assessment of a tax for laying a water-main in Military Road in the District of Columbia, adjacent to the property of the plaintiff in error.

The case was heard on the petition and return of the respondents, and, a motion for judgment being overruled by the Supreme Court of the District of Columbia, the petitioner took an appeal to the court below, and the judgment of the Supreme Court of the District being there affirmed, he removed the case by writ of error to this court.

POINTS AND AUTHORITIES.

I.

THE ACT OF THE LATE LEGISLATIVE ASSEMBLY OF THE DISTRICT OF COLUMBIA, APPROVED JUNE 23, 1873, UNDER WHICH THE ASSESSMENT IN QUESTION WAS LEVIED, IS NOT UNCONSTITUTIONAL BECAUSE IT DOES NOT PROVIDE FOR PRELIMINARY NOTICE TO PROPERTY OWNERS OF INTENTION TO LAY WATER-MAINS.

Water-main taxes in the District of Columbia are imposed in respect of improvements, the cost of which is fixed by legislative enactment. There is no inquiry into the weight of evidence, either as to the propriety of the laying of the mains, the character of materials, or their cost. Such taxes are distinguished from taxes imposed upon property according to its value. In the former case no notice is required. In the latter it is.

This distinction is recognized in Hagar *vs.* Reclamation District (111 U. S., 701), which involved the validity of swamp land assessments. By an act of the Legislature of California, passed in 1868, a general system was established for reclaiming swamp and overflowed salt marsh and tide lands in the State and fitting them for cultivation. Among other objections to the assessments was one that the owners of land were not notified, and had no opportunity to question the validity or amount of the tax, either before its amount was determined or in subsequent proceedings for its collection. Attention is called to the language of Mr. Justice Field in giving the judgment of this Court in that case, at page 708–9—

"The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him, or without his having been afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing. His contention is that notice and opportunity to be

heard are essential to render any proceeding due process of law which may lead to the deprivation of life, liberty or property. Undoubtedly where life and liberty are involved due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But when the taking of property is in the enforcement of a tax the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings before a court of justice, and they are not required for the enforcement of taxes or assessments."

Section 203 of the Revised Statutes of the District provides as follows: "The water tax authorized to be levied and collected by the provisions of the four preceding sections shall constitute a fund to be used exclusively to defray the cost of distribution of the water, including all necessary fixtures and machines connected with such distribution."

The preceding section, 199, authorizes a specific charge on particular property, which is *determined by the Legislature* to be benefited by reason of the laying of the water-main. Notice to property owners of the laying of water-mains is therefore of no possible service to them. The matter to be determined is a plain mathematical calculation.

Where no discretion is left to municipal officers, notice is not essential to the validity of the levy of water-main tax assessments.

25 Am. & Eng. Ency. 546, note 1 and cases.

Whenever a local improvement is authorized, it is for the Legislature to prescribe the way in which and the means by which its costs shall be raised, whether by laying general

taxes or by laying the burden upon the land especially benefited by the expenditure.

Mobile *vs.* Kimball, 106 U. S., 691–704.

Louisiana *vs.* Pillsbury, 105 U. S., 278–295.

The Legislature has the power to determine by ordinance imposing the tax what lands which may be benefited by the improvement are, in fact, benefited ; and if it does, its determination is conclusive upon the owners, and the owners have no right to be heard upon the question whether their lands are benefited or not.

Spencer *vs.* Merchant, 125 U. S., 345–353.

The Legislature, in the exercise of its power of taxation, has the right to assess the whole or a part of the cost of a pubilc improvement upon the owners of land benefited by it; and the determination of the assessment district which should be taxed for local improvements is within the province of the legislative discretion

It is not pretended in this case that the water-main in question was not necessary and proper to be laid, nor that the property of the petitioner was not benefited by the laying of it. His principal objection, after having received the benefit of the improvement, is that he was not notified anterior to the work, and that the assessment was made without regard to the cost of the improvement, and that it was not authenticated by the Water Registrar, as provided by the act of the District Assembly of June 23, 1873.

II.

THE ASSESSMENT COMPLAINED OF WAS NOT A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION.

The water-main tax assessment in question was not levied in the exercise of the power of eminent domain, but in the exercise of the taxing power, and notice was not required.

Baltimore *vs.* Johns Hopkins Hospital, 56 Md., 1.

Alberger *vs.* Baltimore, 65 Md., 1.

Spencer *vs.* Merchant, 125 U. S., 355.

The cost of laying water-mains being fixed by statute at one dollar and twenty-five cents per front foot against abutting property, the entire matter was ministerial.

It is claimed by the appellee that the water-main tax in question is void because laid without regard to the cost of the work.

In Davidson *vs.* New Orleans (96 U. S., 99) the points were made that the Legislature had no right to organize a private corporation to do the work of public improvement, and by statute to fix the price at which the work should be done; that the price so fixed was exorbitant, and that there might be a surplus collected under the assessment beyond what was needed for the work, which must in that event go into the city treasury. This court overruled these contentions and affirmed the judgment.

The laying of the particular main which was the occasion for the tax in controversy was merely an extension of the *water system*. It is not the actual expense of laying a main with which the abutting property is to be charged. The laying of the particular main was the point in time when the appellant's property received the benefit of the water system.

In Leominster *vs.* Conant (130 Mass., 394), which was the case of a sewer assessment, this question was disposed of by Devens, justice, at page 386, as follows:

"The sum assessed to those whose estates abutted on the sewer *was more than the cost of this particular sewer*, and the assessment was made under the (general) system adopted. It was not for a proportional part of the sewer which had been constructed, but according to the *uniform rate which had been determined upon for the sewerage territory.*"

It was contended that this could not be done, but the Court said:

"Whatever system it (the town) might lawfully adopt, the tenant's estate was subject to."

In Taylor *vs.* McFadden (84 Iowa, 262) it was held that an ordinance providing for the establishment of a system of water works and appropriating a sum named for sinking an artesian well was not invalid because the system may prove a failure nor because the cost thereof could not be known in advance.

In many of the States legislation has provided for irrigation and drainage systems and for local assessments and taxes, similar in principle to the one now under consideration, to defray the cost, maintenance and keeping in repair such works. The Illinois statute for the maintenance and keeping in repair of drains, pumping works, etc., for drainage purposes by special assessments was reviewed and held legal.

Hyde Park *vs.* Spencer, 118 Ill., 446.

In Drexel *vs.* Lake (127 Ill., 54) the court said: "The pumping works being, as we have already held, a part of sewer, it is difficult to see how they can be regarded as separate and independent improvements. The pumping works and sewers are no more divisible than are the several parts and sections of the sewer itself. True, the property in which both the storm and sewer drains discharge directly into the main sewer may be said to derive no benefit from the pumping works, but it is equally true that property adjacent to certain portions of the sewer itself will derive no benefit from the construction of other portions. It may well be urged that property situated near the mouth of the sewer will be in no degree benefited by the construction of portions situated two or three miles further south. This, however, is no test to determine whether the improvement is single or double."

In Springfield *vs.* Greene (120 Ill., 269) the improvement for which the assessment was levied consisted of the paving of a large number of the streets and alleys of the city, and it was held to be a single improvement. The test there applied was that the streets and alleys to be paved were so similarly situated with respect to the improvement proposed as

to justify treating them as parts of a common enterprise, and therefore a single improvement.

The benefits in the case of water-mains are purely local, as the use of the water must necessarily be mostly restricted to the benefit of the property abutting the street or avenue in which the mains are laid, both for domestic purposes and the extinguishment of fires. The effect of supplying the streets and avenues of the city with water is to enhance the value of dwelling houses thereon, of which the maintenance of the water-mains and the supplying of water are necessarily a continuing expense, and fully justifies the imposition of such taxes.

Allentown *vs.* Henry, 73 Pa. St., 404, 406.

See also Allen *vs.* Drew, 44 Vt., 174, 187, wherein REDFIELD, Justice, in explanation of the principle of assessments for local improvements, says:

"It is not easy to see any distinction between an assessment for building a sewer or a sidewalk and an aqueduct. They are each in a degree a general benefit to the public, and a special benefit to the local property, both in the uses and in the enhanced value of the property. The proprietor may, indeed, leave his house tenantless and his vacant lots unvisited, but the assessment is not for that reason void. Such assessments are justified on the ground that the subject of the tax receives an equivalent."

III.

THE OBJECT OF WATER-MAIN TAXES IN THE DISTRICT OF COLUMBIA IS TO CREATE A FUND TO DEFRAY THE COST OF DISTRIBUTING POTOMAC WATER.

The Washington aqueduct was designed to supply the Government departments and the inhabitants of the cities of Washington and Georgetown with a plentiful supply of wholesome water from the Potomac River at Great Falls. This splendid work, undertaken in 1857, for the public con-

venience, health, and comfort has thus far cost the Government upwards of $4,000,000, exclusive of the so-called "Lydecker tunnel." To meet the growing demands for water it is necessary to lay additional mains each year. To defray the expenses of laying new mains it is necessary to create a fund by the collection of water-main taxes. To provide for the maintenance, management and repair of the plant or system of water distribution it is necessary that water rates or rents be imposed and collected. The laying of mains and the distribution of water, both in point of fact and by legislative declaration, enhances the value of property abutting streets in which the mains are laid to an amount at least equal to the sums property owners are required to pay as water-main taxes.

Our water system was established by Congress by act approved March 3, 1859 (11 Stat., 436). This act was brought forward in the revision and is incorporated in the Revised Statutes of the District, as Chapter VIII, title "Water Service," sections 199, 200, 201, 202 and 203, of which, relating to *water-main taxes*, are as follows:

SEC. 199. A water-tax may be levied and collected on all real property within the limits of the city of Washington which binds or touches on any avenue, street or alley in which a main water-pipe may be laid by the United States or by the District.

SEC. 200. The water-tax shall be as nearly as possible equal and uniform.

SEC. 201. The water-tax may be levied on lots in proportion to their frontage or their area, as may be determined by law, and may be collected in not less than three nor more than five annual installments.

SEC. 202. All such installments after the first shall bear interest at the rate of six per centum per annum, commencing from the date at which the first installment becomes due, but may, at the option of the owner of the property taxed, be paid and discharged in full at any time after the tax has been levied.

SEC. 203. The *water-tax* authorized to be levied and collected by the provisions of the four preceding sections *shall constitute a fund to be used exclusively to defray the cost of distribution of the water, including all necessary fixtures and machines connected with such distribution*..

The Legislative Assembly of the District being empowered by Congress so to do (Sec. 197, R. S. D. C.), by act approved June 23, 1873, authorized the commissioners of the sinking fund to issue certificates to pay for water-mains, etc , and providing for an assessment for water-mains and fire-plugs in Washington and Georgetown, declares:

"SEC. 6. That hereafter, in order to defray the expense of laying water-mains and the erection of fire-plugs, there be, and is hereby, *levied a special tax of one and a quarter cents per square foot on every lot and part of lot which binds in or touches on any avenue, street, or alley in which a main water-pipe may hereafter be laid and fire-plugs erected*, which tax shall be assessed by the water registrar within thirty days after such water-mains and fire-plugs shall have been laid and erected, of which assessments the water registrar shall immediately notify the owner or agent of the property chargeable therewith, setting forth in said notice the number of the square in which is situated the property on which said tax is assessed, and the street, avenue or alley on which it fronts; and the said tax shall be due and payable in four equal installments, the first of which shall be payable within thirty days from the date of the notice, and the other three shall be due and payable annually, one in each year, dating from the time when the first installment became due, and all of the said installments shall bear interest at the rate of six per cent. per annum, commencing from the date of notification of the assessment; but the owner of the property taxed may, at his option, at any time after the assessment, pay the same in full, and if the said tax shall be paid in full within thirty days from the time notice was given of the levying thereof, an abatement of six per cent. shall be allowed on the whole amount of the assessment, *and in no case shall the same lot be*

chargeable with more than one tax for the laying of water-mains and erection of the fire-plug."

Congress, by Act of February 25, 1895, extended the water system to points in the District beyond the limits of Washington and Georgetown.

The act of the Assembly of 1873 was the law, both in regard to the *rate* and the *principle* of assessing water main taxes, until August 11, 1894, when Congress enacted:

"That hereafter assessments levied for laying water-mains in the District of Columbia shall be at the rate of *one dollar and twenty-five cents per linear front foot*, against all lots or land abutting upon the street, road, or alley in which a water-main shall be laid: *Provided*, That corner lots shall be taxed only on their front, with a depth of not exceeding one hundred feet; any excess of the other front over one hundred feet shall be subject to above rate of assessment: *And provided further*, that in all cases now pending where assessments have been regularly made and the installments paid as they become due and payable, and the tax-payer is not in default or in arrears in any manner, and where there has not been paid a sum equal to one dollar and twenty-five cents per linear foot, as estimated above, then only so much shall be collected as will make the whole sum paid equal to one dollar and twenty-five cents per linear foot. But this act is not intended to give any ground of action for the refunding of any sum already paid in excess of one dollar and twenty-five cents per linear foot, nor for relieving any tax-payer who is in arrears for water-main assessments."

It will thus be seen that Congress treated the laying of water-mains as *an entire system* and considered the principle of taxation by *area* as not a fair and equitable one when the *system* was to be extended *outside* the cities of Washington and Georgetown, as the principle of *frontage* would be, and also because the amount necessary to be raised was not so much as in the beginning of the system.

The right to levy special assessments for local improvements in this District has been settled by this Court.

"Congress may authorize Washington City to assess the expense of repairing the streets with a new and different pavement upon the adjacent proprietors of lots."

Willard *vs.* Presbury, 14 Wall, 670.

Whether the particular proprietor has been benefited by public improvements cannot be reviewed by *certiorari* except for errors of law.

People *vs.* Gilom, 126 N. Y., 147.

IV.

THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA HAD JURISDICTION TO LAY THE WATER-MAIN IN QUESTION.

The provisions of the Revised Statutes of the District, that water-mains shall only be laid on the request of certain abutting property owners, was repealed or modified by the act of Congress approved June 17, 1890, which makes it unnecessary as a condition precedent to laying a water-main that abutting property owners shall be consulted as to its advisability, its cost or the benefit of the work. The language of the act is:

"The Commissioners of the District of Columbia shall have the power to lay water-mains and water-pipes and erect fire-plugs and hydrants wherever the same shall be *in their judgment necessary* for the public safety, comfort or health."

The Court below, in Burgdorf *vs.* District (7 app. D. C., 405), construing this provision, says:

"This substituted section of June 17, 1890, as will be observed, does not confer upon the Commissioners any power to make assessments upon abutting property, or to give notice to the property owners of such assessments, but only confers upon them unconditional and unrestricted authority to determine the question of the propriety and necessity of laying water-mains and water-

pipes, and of erecting fire-plugs and hydrants without respect to petitions or applications of property owners. Property owners may petition for such improvements, but such petition is not essential to the exercise of the power or jurisdiction of the Commissioners in directing such improvement, if, *in their judgment*, it be necessary for the public comfort and health that it should be made, and the fact that the improvement has been authorized and directed by the Commissioners must be taken as conclusive of the fact that it was deemed necessary or proper for the public safety, comfort or health."

The water-tax in question was authenticated by the water registrar as required by law. (Rec. 6 and 7.)

The act of Congress of August 11, 1894, changing the principle of assessment from *area* to *frontage*, and imposing a tax of $1.25 per linear foot against abutting property to defray the cost of laying water-mains is conclusive alike of the question of the cost of the work, the value of the improvement and the benefits, as against abutting property.

District *vs.* Burgdorf (*supra*).
Spencer *vs.* Merchant, 125 U. S., 345.

In the case last cited *Mr. Justice Gray*, speaking for this court, at pages 355 and 356, says:

"The Legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby, and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. Williard *vs.* Presbrey, 14 Wall., 676; Davidson *vs.* New Orleans, 96 U. S., 97; Mobile County *vs.* Kimball, 102 U. S., 691, 703, 704; Hagar *vs.* Reclamation District, 96 U. S., 701. If the Legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. McMillen

vs. Anderson, 95 U. S., 37; Davidson *vs.* New Orleans, and Hagar *vs.* Reclamation District, above cited.

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the State having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed either like other taxes, upon property generally, or only upon the land benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of the Commissioners."

The description of the parcel of land assessed in this case is sufficient. On page 12 of the Record it is admitted that the description of the land assessed is in the same terms as that contained in the petition (Rec., 2), and that it fronts 698 feet on Military Road.

The main was completed July 20, 1895, and the assessment levied August 10, 1895, or within 30 days after the work of laying the mains was completed.

V.

THE ORIGINAL WATER-MAIN TAX OF A CENT AND A QUARTER A SQUARE FOOT FOR LAYING WATER-MAINS WAS A DELIBERATE LEGISLATIVE JUDGMENT OF THE IMMEDIATE COST OF LAYING MAINS AND THE CONTINGENT EXPENSE OF MAINTAINING AND KEEPING THE SAME IN REPAIR:

The law expressly provides that property once assessed for laying water-mains cannot be again assessed either for laying a new main or keeping an old one in repair. In 1894 it was found, when the *system* was extended to the suburbs, or greater Washington, that the rate of a cent and a quarter a square foot was inequitable and excessive, in view of the benefits conferred, the main very often being laid in highways adjacent to unimproved property; and Congress again con-

sidered the expense of laying water-mains and their maintenance and repair, and *reduced* the water-tax from *a cent and a quarter a square foot* to *one dollar and twenty-five cents per linear foot*, according to frontage. A case of clear legislative discretion, carefully and judiciously exercised in view of the changed condition of affairs.

Whatever view the court may take of the contentions of the appellant, we respectfully insist that since there was no *judgment or discretion* to be exercised by the Commissioners in these cases the writ of *certiorari* does not lie to review the question of the cost, utility or the benefit to abutting property by the laying of water-mains. Especially is this so in a case like the one at bar of a tax imposed in terms by the United States Government as a condition to the use of its water system laid in the streets which are its property.

For the reasons hereinbefore set forth, it is respectfully submitted that the judgment of the court below was right, and should therefore be affirmed.

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